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No. 04-742

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN DOE,
On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	*Page*
Adams v. *United States*, 162 Ct. Cl. 766 (1963)	4
Anderson v. *United States*, 136 Ct. Cl. 365 (1956)	4
Anderson v. *United States*, 201 Ct. Cl. 660 (1973)	4
Auburn Housing Auth. v. *Martinez*, 277 F.3d 138 (2d Cir. 2002)	2
Bartnicki v. *Vopper*, 532 U.S. 514 (2001)	3
Baylor v. *United States*, 198 Ct. Cl. 331 (1972)	4
Bennett v. *United States*, 4 Cl. Ct. 330 (1984)	4
Breuer v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003)	3
Buckley v. *United States*, 51 Fed. Cl. 174 (2001)	4
Building & Construction Trades Dep't v. *Martin*, 961 F.2d 269 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992)	2
Byrnes v. *United States*, 163 Ct. Cl. 167 (1964)	4
Calloway v. *District of Columbia*, 216 F.3d 1 (D.C. Cir. 2000)	2
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	5
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001)	7
Crowley v. *United States*, 53 Fed. Cl. 737 (2002)	4
De Costa v. *United States*, 22 Cl. Ct. 165 (1990)	4
Fix v. *United States*, 368 F.2d 609 (Ct. Cl. 1966)	4
Hannon v. *United States*, 29 Fed. Cl. 142 (1993)	4
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999)	7
Manning v. *United States*, 10 Cl. Ct. 651 (1986)	4
Neal v. *United States*, 516 U.S. 284 (1996)	6
Norfolk S. Ry. v. *James N. Kirby, Pty Ltd.*, 125 S. Ct. 385 (2004)	3
OPM v. *Richmond*, 496 U.S. 414 (1990)	3

TABLE OF AUTHORITIES—Continued

	Page
Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994)	7
Rapp v. *United States*, 340 F.2d 635 (Ct. Cl. 1964)	4
Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992)	2
Schweiker v. *Hansen*, 450 U.S. 785 (1981)	3
United States v. *Hatter*, 532 U.S. 557 (2001)	9
United States v. *Mead Corp.*, 533 U.S. 218 (2001)	5
United States v. *Winstar Corp.*, 518 U.S. 839 (1996)	3
Statutes:	
Consolidated Appropriations Act, 2000, 113 Stat. 1501 (1999)	2
Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, 114 Stat. 2762 (2000)	2
Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-219	8
Federal Employees Pay Act, 59 Stat. 295, as amended, 5 U.S.C. §§ 5541-5550a	1, *passim*
Tucker Act, 28 U.S.C. § 1491	9
5 U.S.C. § 5542	3, *passim*
5 U.S.C. § 5543	3
28 U.S.C. § 1292	3
28 U.S.C. § 1492 (1970 ed.)	4
28 U.S.C. § 2509 (1970 ed.)	4
Executive Orders:	
E.O. No. 9578, 10 Fed. Reg. 8191 (1945)	5
Regulations:	
5 C.F.R. § 550.111	6

TABLE OF AUTHORITIES—Continued

Miscellaneous: *Page*

Hearings Before House Comm. on Civil Service on H.R. 2497 and H.R. 2703, 79th Cong., 1st Sess. (1945) 7

Recommendation to Senate, *McQuown* v. *United States*, 199 Ct. Cl. 858 (1972) 4

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Department does not attempt to deny that the Federal Circuit's decision has disrupted the law affecting hundreds of thousands of federal employees, not just Justice Department attorneys. The Federal Circuit's sudden landmark ruling has provided a roadmap for all agencies to demand that their professional employees work overtime—but, in spite of FEPA, to escape compensating them. Under the Court of Appeals' decision any and all departments and agencies of the Executive Branch, by calculated withholding of writings, can grant themselves unfettered license to demand overtime work but to refuse to pay for it, leaving FEPA effectively nullified.

The Department told the Court of Appeals that "the importance of the question cannot be exaggerated," in part because "FEPA applies to the entire Federal Government." See Pet. Cert. 28. Now it reverses field, calls the Federal Circuit's sweeping legal ruling "fact-intensive," Opp. 19,[1] and notes that petitioners had responded (accurately) that the trial court's decision simply applied what was overwhelmingly settled law to the Justice Department's defiance of FEPA. Opp. 11. But precisely because the Court of Appeals did grant interlocutory review, reversed, explicitly overruled more than a dozen decisions, P.C.A 15a, and ordered summary judgment for the government—and thus completely changed the law—the decision now has become one with enormous impact on the federal workforce, and also an unsettling anomaly legally.

I.

The Department now argues that the case "lacks prospective significance" because a provision in a 1999 appro-

[1] "Opp." refers to the Brief in Opposition; "P.C.A." refers to the Appendix to the Petition for Certiorari.

priations act, 113 Stat. 1501, 1501A-21 (1999), reenacted substantially in an appropriations act the following year, prohibited premium pay under FEPA for overtime work of Justice Department attorneys after that date. Opp. 10-11. "Prospective significance" is in no way diminished.

(a) The appropriations provision applied only to government attorneys employed by the Justice Department. It altered in no way the government's overtime-pay obligation under FEPA to the tens of thousands of other attorneys, as well as hundreds of thousands of executive, administrative or professional employees, in other departments and agencies.

(b) The provision applied to expenditures in a single fiscal year. Under accepted rules of statutory construction, in the absence of an express statement that a provision in an annual appropriations act is to apply to subsequent fiscal years, it lapses at the end of the fiscal year it concerns. *E.g., Building & Construction Trades Dep't* v. *Martin*, 961 F.2d 269, 274 (D.C. Cir.) ("a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent"), *cert. denied*, 506 U.S. 915 (1992).[2] Congress itself obviously believed that the 1999 appropriations provision covered only a single year, because it adopted a similar rider in the appropriations act of the following year. See 114 Stat. 2762, 2762A-68 (2000). The second provision, like the previous one, also expired. See *Auburn Housing Auth.* v. *Martinez*, 277 F.3d 138, 146-47 (2d Cir. 2002) ("hereafter" in appropriations act rider referred only

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[2] The Brief in Opposition incorrectly states that "[p]etitioners assert (Pet. 30 n.18) that this legislation is invalid because it was enacted as part of an appropriations statute." Opp. 11. Petitioners have never disputed that Congress *can* amend substantive law in appropriations acts—but only provided "it does so clearly," which is not the case here. *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992). See also *Calloway* v. *District of Columbia*, 216 F.3d 1, 9-10 (D.C. Cir. 2000) (strong presumption that appropriations provision is not intended to change substantive law).

to the year for which appropriations were being made). Congress did not adopt such a provision again after 2000.

(c) The appropriations provision applies only to payment in money. But the issue is the government's liability under 5 U.S.C. § 5542. Even if funds to pay the compensation they are owed under FEPA were not available, petitioners and their successors still could seek the statutory alternative of compensatory time off, see 5 U.S.C. § 5543, which would not require expenditure of funds.[3]

II.

The Federal Circuit also has upset the established understanding of two basic decisions of this Court. The Department does not attempt to deny that four other Circuits have interpreted *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *OPM* v. *Richmond*, 496 U.S. 414 (1990), quite contrary to the peculiar reading by the Federal Circuit. Those Circuits recognize that this Court in those cases was addressing claims to recover *contrary to* a statute—not, as here, claims to recover *under the terms of* a statute. See Pet. Cert. 17-18. The Department's response is that those cases did not "impose monetary liability on the United States." Opp. 17; see also *id.* 18. That is correct—but irrelevant to the point, which is that other Circuits understand the rule of *Schweiker* and

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[3] The Department says that petitioners are "pursu[ing] . . . relief in the trial court" on other bases. Opp. 12. Such proceedings ended. The trial court pursuant to the Court of Appeals' mandate entered summary judgment for the government on the entire case, and denied reconsideration. Judgment and Order, Sept. 16, 2004, Feb. 2, 2005. In any event, this Court regularly grants certiorari to review important decisions heard on interlocutory review by the courts of appeals under 28 U.S.C. §§ 1292(b) or 1292(d)(2), whether or not other claims are pending. *E.g.*, *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 125 S. Ct. 385 (2004); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001). This is no less true for such cases from the Federal Circuit. *E.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

Richmond completely contrary to the Federal Circuit, whose sudden upending of 49 years of law was based on its novel interpretation of those two cases.

The Department, again irrelevantly, denounces theories of equity or estoppel. None was advanced here. Opp. 16. Petitioners at all times explicitly eschewed any equitable or estoppel claims. See Pet. Cert. 16 & n.6. At least 13 consistent and pertinent decisions of the Court of Claims and other courts applying FEPA, spread over the past half century, have held the government liable under FEPA for overtime officially ordered or approved, whether or not the order or approval was written down.[4] None of those 13 decisions ever mentioned "estoppel."[5]

III.

The Federal Circuit's decision also has undermined the rules concerning deference to agency regulations. The Department, arguing that OPM's regulation—as the Department

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[4] *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956); *Adams* v. *United States*, 162 Ct. Cl. 766 (1963); *Byrnes* v. *United States*, 163 Ct. Cl. 167 (1964); *Rapp* v. *United States*, 340 F.2d 635 (Ct. Cl. 1964); *Fix* v. *United States*, 368 F.2d 609 (Ct. Cl. 1966); *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972); *Anderson* v. *United States*, 201 Ct. Cl. 660 (1973). See also *Bennett* v. *United States*, 4 Cl. Ct. 330 (1984); *Manning* v. *United States*, 10 Cl. Ct. 651 (1986); *De Costa* v. *United States*, 22 Cl. Ct. 165 (1990); *Hannon* v. *United States*, 29 Fed. Cl. 142 (1993); *Buckley* v. *United States*, 51 Fed. Cl. 174 (2001); *Crowley* v. *United States*, 53 Fed. Cl. 737 (2002).

[5] *McQuown* v. *United States*, 199 Ct. Cl. 858 (1972), which the Department incorrectly describes as an "example" of "Court of Claims decisions," Opp. 16, was not a decision of the Court of Claims or any judges thereof, but rather a recommendation to the Senate by three commissioners concerning a private-relief bill. See 28 U.S.C. §§ 1492, 2509 (1970 ed.); 199 Ct. Cl. at 858, 861. In summarizing the argument of the constituent seeking legislative relief the commissioners once used the word "estopping." 199 Ct. Cl. at 866. They recommended against the private bill because the statute of limitations had expired through the fault of the constituent. *Id.* at 875-76.

now interprets it—is determinative, cites *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001) (reversing a previous Federal Circuit misunderstanding of deference rules). But the Department never confronts a central flaw in the Federal Circuit's opinion. No deference is owed to an interpretation of an agency regulation that nullifies the heart of a statutory command. *Chevron*, 467 U.S. at 843; see cases at Pet. Cert. 19. The regulation as interpreted by the Federal Circuit transforms a congressional pay mandate into an option dependent on agency discretion. The regulation, as interpreted by the Federal Circuit, allows agencies to require overtime free, and thus nullifies the statute.

Also, OPM has never given its regulation the unauthorized interpretation the Department would affix; and it was heretofore settled law that OPM's interpretation, not the Department's, would be the only one deferred to under *Chevron*. See Pet. Cert. 26-28. The Department tries to finesse that obstacle, pretending that its own practice should be treated as if OPM had sanctioned it, even though there is nothing in the record, and the Department points to nothing, to suggest that either the Civil Service Commission or OPM ever said such a thing. Opp. 12-13. In fact, what the record shows is that when OPM once inquired about a rumored opinion by the Department's Office of Legal Counsel that the Justice Department was refusing to pay overtime to attorneys in violation of FEPA, P.C.A. 79a, the Department refused to provide OPM a copy of the opinion. See P.C.A. 88a.

The initial regulation implementing FEPA, which the Department quotes, directed agencies to make a record when they ordered or approved overtime *work*: "No overtime in excess of the administrative workweek shall be ordered or approved except in writing [by an authorized official]." Opp. 2, quoting 10 Fed. Reg. 8191, 8194 (1945). It said nothing to erase their obligation to *pay* for overtime that they have

ordered or approved. The Department, like the Federal Circuit, conceives that FEPA would allow a distinction between ordering or approving overtime *work*, and ordering or approving overtime *pay*. Opp. 13. But the whole purpose of FEPA was to ensure that such a decoupling could not occur.[6]

Also, the regulation has long been interpreted by the courts contrary to the Department's interpretation here, and those longstanding judicial interpretations supersede subsequent agency ones. *Neal* v. *United States*, 516 U.S. 284, 295 (1996); Pet. Cert. 22-24. Indeed, for years the regulation has been interpreted contrary to the Department's current position, not just by the courts—but by the Department itself. See Pet. Cert. 24-26. Its current litigating position receives no deference. Pet. Cert. 25.

The Department, like the Court of Appeals, asserts with no textual basis whatsoever that the regulation contemplates not only a written order or approval, but one specifying particular hours to be worked. On that basis, for example, the unrestricted order and approval in the *United States Attorneys' Manual*—that attorneys are expected to work overtime however many hours are necessary to do the job—the Department says is not enough. The Court of Appeals on such invented grounds held the *Manual* insufficient because "[t]he Manual does not order attorneys to work *any amount* of overtime," and "instructs attorneys not to expect overtime compensation rather than instructing them to work *particular amounts* of overtime." P.C.A. 26a (emphasis supplied). It also added, again with no support in the regulation, that orders or approvals must be "prior." P.C.A. 27a.

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[6] The Department pretends that the governing OPM regulation "requires that *compensable* overtime 'be ordered or approved . . . .'" Opp. 12 (emphasis supplied). Not so. The regulation, 5 C.F.R. § 550.111, speaks not of "compensable overtime," but of "overtime work." It is the Department, not the OPM regulation, that seeks to differentiate overtime required to be worked, and "compensable" overtime.

IV.

The Department's excursion into legislative history is a far cry from the interpretive rules followed by this Court. Where statutory language is clear, one does not seek meaning elsewhere. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). The Department relies on no committee report, no statements in debate, but rather its interpretation of a snippet of a comment by a witness in a House committee hearing. Opp. 14.[7] And the witness, Commissioner Arthur Flemming, never suggested that an agency can order or approve overtime work without pay. What he said was that agencies no doubt would adopt strict controls on *authorizing* overtime work, for the very reason that they would have to pay for it. See *Hearings Before House Comm. on Civil Service on H.R. 2497 and H.R. 2703*, 79th Cong., 1st Sess., 51 (1945). The Department inaccurately states that Mr. Flemming testified that previous regulations placed "adequate controls on the *payment* of overtime." Opp. 7 (emphasis supplied). What he said was, "'I know that the regulations under which overtime is *ordered* and co[m]pensated for are very strict, and in most instances requests for approval have to come all the way to the top.'" Opp. 14 (emphasis supplied), quoting *Hearings*, *supra*, at 51. Thus he predicted that agencies would carefully control whether overtime would be "ordered"—and therefore "co[m]pensated."

The Department of Justice, however, has done just the opposite: ordering or approving overtime for its attorneys without limitation, indeed, demanding more and more, *e.g.*, P.C.A. 119a—but refusing the compensation that the statute commands must accompany those orders or approvals. What

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[7] See, *e.g.*, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 120 (2001) ("problematic" to rely on testimony before Senate committee); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 522 n.12 (1994) (declining to rely on "colloquy with the principal House sponsor of the Act").

the legislative history shows is that the anticipated way to control overtime pay was to limit orders or approvals—not, as the Justice Department has done, officially to order and approve overtime *ad libitum*, and then simply disregard the obligation to pay for it. The Court of Appeals nevertheless ruled as it did even though "[t]he government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation." P.C.A. 27a.

V.

The Department's sketchy and antiseptic description of the uncontested facts circles gingerly around the reality without ever arriving there. The record contains not only dozens of instances of *orders*, but also many others of *approvals* (both prospective and retrospective) by officials with unquestioned delegated authority. Thus the *United States Attorneys' Manual* directs that DOJ attorneys "are professionals and should expect to work in excess of regular hours without overtime pay." P.C.A. 89a. (It is conceded that FEPA, unlike the Fair Labor Standards Act, contains no exemption for professionals. See Pet. Cert. 2, 20 n.9.) The Brief in Opposition ignores, for example:

1. The cascade of internal Justice Department opinions and memoranda acknowledging overtime liability under FEPA. See Pet. Cert. 8-10.

2. The Department's requirement that attorneys meticulously record their overtime worked, in a second set of books. P.C.A. 107a-109a.

3. The affidavits regularly submitted to courts by Assistant Attorneys General listing overtime hours and seeking compensation to be paid to the Department under fee-shifting statutes. See Pet. Cert. 7.

4. The career rewards and punishments tied to an attorney's overtime performance. See Pet. Cert. 7.

5. The speeches praising overtime and exhortations to do more, and the quarterly rankings of districts by overtime. *E.g.*, P.C.A. 111a, 117a, 122a.

6. The Department's repeated concessions in courts that FEPA requires payment of overtime ordered or approved, whether or not in writing. See Pet. Cert. 7-8, 24-25.

7. The Department's unsuccessful effort to get FEPA amended to exclude its attorneys. Pet. Cert. 9, P.C.A. 105a.

VI.

The remedy suggested by the Department of Justice—defiance of orders and neglect of duties to client and court, Opp. 19-20—is both fanciful and shameful. The Department imagines that government professionals should defy commands to work uncompensated overtime, and then bring personnel actions when they are disciplined. *Id.* The Department no doubt is confident that that will not happen. The long-recognized and orderly way to seek redress for an agency's refusal to pay for the overtime it requires its employees to work is not to walk off the job and jeopardize one's career by awaiting and then administratively challenging adverse personnel actions for refusal to perform assigned duties. Rather, it is to file a Tucker Act action to recover compensation, exactly as was done here.

That the Department charged with enforcing the laws is seeking to withhold from more than 9000 of its attorneys pay to which they are entitled by statute is reason enough to grant certiorari. *Cf. United States* v. *Hatter*, 532 U.S. 557 (2001) (certiorari to review judges' claim for pay). But the impact of the Federal Circuit's decision, overturning half a century of settled federal pay law, is far more explosive than that. The Department does not deny that FEPA applies government-wide, and that this decision governs not only attorneys in

other departments and agencies, but hundreds of thousands of government professionals in non-legal positions as well. This decision is a judicial invitation to widespread nullification of FEPA's overtime-pay requirements. The Federal Circuit has converted a mandatory pay entitlement into a discretionary one. The results can be confidently predicted, and there is no other court, except this one, to undo this damage to the federal workforce and the law.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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